

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

HUBER ENGINEERED WOODS LLC,)	
)	
Plaintiff and Counterclaim-Defendant,)	C.A. No. 19-342-VAC-SRF
)	
v.)	JURY TRIAL DEMANDED
)	
LOUISIANA-PACIFIC CORPORATION,)	REDACTED PUBLIC VERSION
)	
Defendant and Counterclaim-Plaintiff.)	

**DEFENDANT LOUISIANA-PACIFIC CORPORATION'S
OPENING LETTER TO THE HONORABLE SHERRY R. FALLON
REGARDING ITS COMBINED MOTIONS TO COMPEL**

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*Attorneys for Defendant/Counterclaim
Plaintiff Louisiana-Pacific Corporation*

Dated: May 5, 2022

Dear Judge Fallon,

LP seeks an order (1) compelling HEW to supplement its privilege log to log patent prosecution documents of the patents-in-suit and compelling production of certain documents improperly withheld by HEW on the basis of privilege pursuant to Rule 37(a)(3); and (2) compelling HEW to supplement its responses to Interrogatory Nos. 28, 29, and 32 to provide the information sought and to provide responsive information known to J.M. Huber Corp., HEW's intertwined parent.

A. HEW Should Be Compelled to Log Prosecution Documents of the Patents-In-Suit.

LP seeks to compel HEW to supplement its privilege log on the limited subject matter of HEW's prosecution of the patents-in-suit, both pre-litigation (which were never logged for its prosecution counsel) and for the limited post-litigation time frame of November 2020 (when HEW was put on notice of priority issues with the uncorrected '588 patent) to January 4, 2022 (the filing date of HEW's Amended Complaint). As a threshold matter, HEW failed to log any pre-litigation communications or documents for John Greenwald, primary prosecution counsel for the patents-in-suit. LP asked for an explanation of why these documents were not logged and to date has received none. *Regeneron Pharms., Inc. v. Merus N.V.*, 864 F.3d 1343, 1361-64 (Fed. Cir. 2017) (discussing relevance of documents relating to prosecuting attorneys' file). In addition to pre-suit prosecution activities, more than a year *after* the Court entered the ESI Order (D.I. 20 at 8), HEW began filing the first of many repeated requests with the U.S. Patent Office to change the priority date of the '588 patent, resulting in multiple denials and numerous representations and statements to the PTO regarding the '588 patent and other patents in the same family. (*See, e.g.*, D.I. 199.) In defending against HEW's Amended Complaint adding a new cause of action for the corrected '588 Patent, LP asserted a number of defenses, including inequitable conduct in connection with HEW's prosecution activities. (D.I. 297 at pp. 42-45); *see also Pall Corp. v. Cuno Inc.*, 268 F.R.D. 167, 170 (E.D.N.Y. 2010) (privilege may be waived by relying on good faith defense to assertions of inequitable conduct). HEW refusal to log relevant prosecution documents hinders LP's ability to fully and fairly defend against HEW's new complaint, which the Court specifically stated LP has the right to do. (D.I. 280 at 16:21-17:1; D.I. 281); *see also I-Med Pharma Inc. v. Biomatrix, Inc.*, Civ. No. 03-3677 (DRD), 2011 WL 6140658, at *4 (D.N.J. Dec. 9, 2011) (no showing of "exceptional circumstances" or "manifest injustice" is required to modify a discovery stipulation). LP cannot properly evaluate HEW's assertions of privilege or whether privilege may have been waived without a privilege log to enable LP to assess HEW's privilege claims. Accordingly, LP respectfully requests that the Court modify the ESI Order and require HEW to log all documents relating to its patent prosecution activity during the applicable time periods.

B. HEW's Privilege Log is Woefully Deficient And Those Documents Should Be Produced.

Under Rule 26(b)(5), "[a] party can sustain [its] burden [of demonstrating the applicability of attorney-client privilege] through a properly prepared privilege log that identifies each document withheld, and contains information regarding the nature of the privilege/protection claimed, the name of the person making/receiving the communication, the date and place of the communication, and the document's general subject matter." *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 232 (S.D.W. Va. 2015) (quoting *Sky Angel US, LLC v. Discovery Comms., LLC*, 28 F. Supp. 3d 465, 483 (D. Md. 2014)). Here, however, there are numerous entries on HEW's log **where no custodian or author is identified, where no sender or recipient are identified, or where a non-lawyer sender is identified but no recipient is identified.** (*See, e.g.*, Ex. A – HEW Privilege Logs - Entries 110-112, 164-165, 182, 204-209, 211-212, 235, 238, 241, 244, 249, 252, 255, 258,

275-276, 296-300, 326-327, 338-341, 383, 385-387, 537-538, 540-548, 550-561, 563-589, 591, 597, 601, 603, 605, 607-612, 619, 626-629, 636-637, 643-644, 646-654, 657, 661-670, 672-678, 680-688, 693-694). HEW has refused to supplement its privilege log for many of these entries despite multiple requests from LP to do so. A party who “does not identify any specific attorney with whom a confidential communication was made . . . has failed to provide sufficient detail to demonstrate fulfillment of the legal requirements for the application of the privilege.” *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 477 (E.D. Pa. 2005) (quotation omitted).

Additionally, there are numerous entries **where the distribution list does not support an assertion of privilege**, because they reflect wide distribution of the information. and/or do not involve specific legal counsel. (*See, e.g.*, Ex. A - Entries 210, 213-218, 221, 223-230, 272, 277-280, 316-319, 342, 345, 347-349, 353-356, 361, 363, 375, 377, 382, 510, 516, 518-522, and 592). For most of these entries, HEW does not identify any attorney as being involved in authoring, directing, sending, or receiving the communication at all. *See SmithKline*, 232 F.R.D. at 477. Where a document is not authored by an attorney, the party claiming the privileged must establish “some nexus between the privileged communication and a *specific attorney*.” *Schwarz Pharma., Inc. v. Teva Pharms. USA, Inc.*, No. CIV A 01-4995 (DRD), 2007 WL 2892744, at *3 (D.N.J. Sept. 27, 2007) (emphasis added).

Additional entries on HEW’s log, many of which overlap with those addressed above, **fail to provide an adequate description of the document to support HEW’s claim of privilege**. (*See, e.g.*, Ex. A - Entries 65, 67, 71-74, 110-112, 182, 204-209, 211-212, 338-341, 537, 540-541, 543-547, 551-561, 563-574, 578-579, 587-589, 591, 597, 601, 605, 607-613, 619, 626-629, 636-637, 643-644, 647, 654, 672-676, 678, 691). HEW begins each of its descriptions with iterations of form language and then provides a brief description of the subject matter, such as “Georgia Pacific,” “Zip System,” “One Step Roofing,” “HEW Strategy Review,” “Board of Directors presentation,” “HEW product launch.” None of these subjects are inherently legal in nature and, particularly with respect to those documents without any author or distribution information, appear to be business-oriented in nature. HEW’s “conclusory assertion that a document is privileged is inadequate to meet the burden imposed by Rule 26(b)(5)(A).” *Johnson*, 309 F.R.D. at 232; *see Jansson v. Stamford Health, Inc.*, 312 F. Supp. 3d 289, 298 (D. Conn. 2018) (finding insufficient the privilege log description “Communications re: Jansson contract”). Further, **no privilege redacted documents have been logged by HEW**. In Entry 695, HEW provides no information regarding the date, custodian, author, recipient, or even Bates number of any documents containing redactions for privilege. HEW instead conclusorily states “[s]uch redactions are privileged because they reflect legal advice or legal analysis provided by counsel or done the direction of counsel.” This is plainly insufficient to sustain a claim of privilege.

LP anticipates that HEW may take issue with the timing of LP’s challenge to HEW’s privilege log. This ignores the facts and law of the case. The deficiencies with HEW’s privilege log became highly relevant in light of LP’s inequitable conduct theories asserted in response to HEW’s new cause of action in January 2022. The documents withheld by HEW based on its insufficient and meritless privilege assertions are directly relevant to LP’s defenses. Moreover, here, fact discovery has been reopened, and the Court has explicitly made clear that LP has a full and fair opportunity to defend against HEW’s new cause of action. (D.I. 280 at 16:21-17:1.) Finally, there is no local rule limiting the time to challenge a privilege log and other courts have recognized that privilege logs may be challenged at any time. *See Fed. Trade Comm’n v. Abbvie, Inc.*, Civil Action No. 14-

5151, 2015 WL 8623076, at *12 n.14 (E.D. Pa. Dec. 14, 2015) (rejecting that a privilege log challenge was untimely when made in a *subsequent lawsuit years later*).

C. HEW Should Be Compelled to Fully Respond to Interrogatory Nos. 28, 29, & 32.

LP's Interrogatory Nos. 28, 29, and 32 seek information directly related to LP's defenses, namely detailed information regarding each sale, offer for sale, use, and disclosure of [REDACTED]

[REDACTED] Despite correspondence exchanged and a meet and confer regarding HEW's deficient interrogatory responses (*see* Ex. B), the latest version of HEW's responses to Interrogatory Nos. 28, 29, and 32, which are attached as Exhibits C and D, remain deficient.

The issues with HEW's responses are two-fold: they do not provide the information sought and limit the responses to only instances noted in LP's Initial Invalidity and Unenforceability Contentions Post-Amended Complaint ("Contentions") based on the limited information currently known by LP. By way of example and not limitation, in response to Interrog. No. 28, HEW does not provide the names of the persons involved in the [REDACTED]

[REDACTED]. HEW has also refused to provide any information beyond simply summarizing the documents referenced in LP's Contentions, and HEW's response makes claims such as "LP has not identified any evidence," "LP provides no evidence," and so on. (Ex. C at pgs. 10-11). However, the Interrogatories do not merely ask HEW to respond to LP's contentions; HEW must respond with all information within its possession, custody, or control, not merely that is identified in LP's contentions.

HEW's response to Interrog. No. 29 is essentially identical in its deficiencies as those to No. 28 even though No. 29 seeks all facts and reasons concerning [REDACTED]

[REDACTED] (See Ex. C at 33-51.) HEW does not provide any additional information beyond that provided in response to No. 28. HEW's response to No. 32 likewise appears to have been largely copied from its responses to Nos. 28 and 29. HEW's response to No. 32 also seemingly ignores LP's use of and definition for "Huber Product" in response to this Interrogatory and responds as if "Huber Product" is identical to the "One Step Embodiment" asked about in Nos. 28 and 29. (Ex. D at 6-29.)

D. HEW Should Respond to Interrogatories With Information in J.M. Huber's Knowledge. During the parties' meet and confer on April 25, 2022 regarding Nos. 28, 29, and 32, HEW's counsel revealed for the first time that information known to and within the possession of J.M. Huber Corporation ("J.M. Huber"), HEW's parent company which oversees HEW's operations

and shares back office functions with HEW, has not been provided to LP. However, that responsive information may be in J.M. Huber's possession does not excuse HEW from providing it to LP. The duty to provide responsive information "can include information held by a parent company." *Grosek v. Panther Transp., Inc.*, 251 F.R.D. 162, 166 (M.D. Pa. 2008). "Control" is construed very broadly in this context. "[W]here the litigating corporation is the subsidiary and the parent possesses the records, courts have found control to exist on the following alternate grounds: (1) the alter ego doctrine which warranted 'piercing the corporate veil'; (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit; (3) the relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation; (4) there is access to documents when the need arises in the ordinary course of business; and (5) subsidiary was marketer and servicer of parent's product . . . in the United States." See, e.g., *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 441-42 (D.N.J. 1991) (quoting *Gerling Int'l Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988)). Here, grounds (1), (2), (3), and (4) are satisfied.

HEW initially operated as a division of J.M. Huber. Indeed, HEW did not exist as a LLC as of the date HEW claims "the idea for the claimed inventions was first conceived on August 16, 2000" and when samples of One Step Roofing products were shared with builders and dealers throughout 2002 and 2003. (Ex. C at 5-7). Even after HEW was formed as a separate LLC, the relationship between J.M. Huber and HEW has remained extremely close. As explained by HEW's CFO and Vice President of Strategy, Kirk Blanchette, "Huber Engineered Woods, LLC is one of the operating units underneath the JM Huber Corporation," HEW's financial statements "roll up to JM Huber," HEW provides monthly financial reports to the "JM Huber corporate team," and HEW and J.M. Huber have "shared back office and other functions." (Ex. E - Blanchette Tr. 20:12-16, 20:23-25, 101:1-14, 103:3-8, 104:1-2). Of note, all of the in-house legal counsel identified on HEW's privilege log regarding the prosecution and enforcement of the patents-in-suit are employed by J.M. Huber. (See Ex. A - Supplemental Listing of Legal Counsel Identified on HEW's Privilege Log). All of HEW and J.M. Huber's employees appear to use the same email/domain address -- "@huber.com". The Terms and Conditions section of HEW's website includes a copyright notice indicating that "J.M. Huber Corporation owns the copyright in all material provided on this Site." (Ex. F - Printout of Terms and Conditions). Further, the companies are so intertwined that the named inventors of the patents-in-suit could not say whether they were employed by J.M. Huber or HEW or believed they were employed by both. (See Ex. G - Rick Jordan Tr. 18:20-22; Ex. H - Landus Bennett Tr. 17:6-22; Ex. I - Nian Ou Tr. 10:14-11:4).

Further, HEW has self-servingly disclosed and relied on J.M. Huber's documents and produced them in this litigation. (See, e.g., Ex. J.) Thus, HEW clearly has access to J.M. Huber's documents when the need arises in the ordinary course of business and when it would be helpful in this litigation. HEW should not be permitted to shield the knowledge of J.M. Huber that is responsive to LP's discovery. The Court has made clear that LP is entitled to a full and fair opportunity to defend against HEW's Amended Complaint, and the information sought is directly relevant to LP's defenses and within the exclusive possession of HEW/J.M. Huber. Accordingly, LP respectfully requests that the Court enter the Proposed Order attached hereto as Exhibit K.

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Dated: May 5, 2022

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2022, true and correct copies of the foregoing document were caused to be served on the following counsel of record as indicated:

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**EXHIBITS A-E
REDACTED IN THEIR
ENTIRETY**

EXHIBIT F

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**EXHIBITS G-J
REDACTED IN THEIR
ENTIRETY**

EXHIBIT K

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

HUBER ENGINEERED WOODS LLC,)
Plaintiff,)
v.) C.A. No. 19-342-VAC-SRF
LOUISIANA-PACIFIC CORPORATION,)
Defendant.)

[PROPOSED] ORDER

Upon reviewing Defendant Louisiana-Pacific Corporation’s (“LP”) discovery dispute letter and Plaintiff Huber Engineered Woods LLC’s (“HEW”) response thereto, and the Court having considered all papers and arguments submitted by the parties in connection with this discovery dispute, and the Court having determined that there are good grounds for the requested relief; IT IS HEREBY ORDERED that:

1. No later than one week from the date of this Order, HEW shall serve a privilege log of all communications dating before February 18, 2019 and from November 2020-January 4, 2022 regarding prosecution of the ’588 patent and applications to which the ’588 patent claims priority, including related to the Certificates of Correction for the ’588 patent and patents in the same family;
2. No later than one week from the date of this Order, HEW shall produce the documents identified on its privilege log as entry nos. 65, 67, 71-74, 110-112, 164-165, 182, 204-218, 221, 223-230, 235, 238, 241, 244, 249, 252, 255, 258, 272, 275-276, 277-280, 296-300, 316-319, 326-327, 338-341, 342, 345, 347-349, 353-356, 361, 363, 375, 377, 382-383, 385-387, 510, 516, 518-522, 537-538, 540-548, 550-

561, 563-589, 591-592, 597, 601, 603, 605, 607-613, 619, 626-629, 636-637, 643-644, 646-654, 657, 661-670, 672-678, 680-688, 691, 693-694, 695; and

3. No later than one week from the date of this Order, HEW must supplement its responses to Interrogatory Nos. 28, 29, and 32 to include the information sought, including information known to J.M. Huber Corporation as well as information within J. M. Huber Corporation's possession, custody, or control.

UNITED STATES MAGISTRATE JUDGE